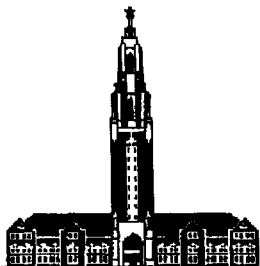


RECEIVED  
3/19/03

03-AP-B



School of Law

OKLAHOMA CITY UNIVERSITY

2501 N. Blackwelder  
<http://www.okcu.edu/law>Oklahoma City, Oklahoma 73106-1493 • (405) 521-5361  
Fax (405) 521-5089

March 4, 2003

Peter G. McCabe, Secretary  
Committee on Rules of Practice and Procedure  
Judicial Conference of the United States  
Washington, D.C. 20544

Re: Proposed rule change

Dear Mr. McCabe:

This is to request that consideration be given by the Judicial Conference to the adoption of a new rule of appellate procedure that would require federal appellate courts to issue written opinions for all dispositions. Since it is a proposed appellate procedure change, it presumably should be submitted to the Advisory Committee on Appellate Rules. Specifically, the rule would provide as follows:

**Rule 49. Written opinions**

The court must issue a written opinion explaining the basis for each disposition. The opinion should expound on the law as applied to the facts of the case and set out the basis for the disposition.

The initial basis for my proposal is that it is required by the constitution. The Fifth Amendment guarantees that no person shall be deprived of life, liberty, or property without due process of law. In my view, this due process protection means that every person appearing in a court of the United States is due an explanation from the court for the reasons for its disposition, given the facts and the law. But in addition to being constitutionally required, I believe that my proposed rule change can be supported by powerful arguments of expediency. I have set out below, in summary form, a few of these arguments.

- The necessity for written justification is a powerful preventive of wrong decisions. The Supreme Court has for just this reason in several contexts required administrative officials to justify their decisions. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (holding that statement of reasons for decision is one of "minimal procedural requirements" to justify termination of welfare benefits); *Morrissey v. Brewer*, 408 U.S.

Peter G. McCabe, Secretary  
Re: Proposed rule change

March 4, 2003  
Page 2

471 (1972)(holding that due process requires statement of reasons for parole revocation); *Wolff v. McDonnell*, 418 U.S. 539 (1974)(holding that due process requires statement of reasons for revocation of inmate's good time credits); *Goss v. Lopez*, 419 U.S. 565, 581 (1975)(requiring statement of reasons for suspension of student from school). There is no reason why a "reasons" requirement would not assist judicial officers in reaching correct results in the same manner that it assists administrative officers.

• A disposition without a written opinion removes the discipline that requires judges to reach decisions that are justified by the law and not simply their personal preferences. Karl Llewellyn's statement of this principle is perhaps the best known.

In our law the opinion has in addition a central forward-looking function which reaches far beyond the cause in hand: the opinion has as one if not its major office to show how like cases are properly to be decided in the future. This also frequently casts its shadow before, and affects the deciding of the cause in hand. (If I cannot give a reason I should be willing to stand to, I must shrink from the very result which otherwise seems good.) Thus the opinion serves as a steady factor which aids reckonability.

Karl Llewellyn, *THE COMMON LAW TRADITION* 26 (1960). Professor Llewellyn's observations have been mirrored by many others. As noted by Judge Coffin,

[a] remarkably effective device for detecting fissures in accuracy and logic is the reduction to writing of the results of one's thought processes . . . . Somehow, a decision mulled over in one's head or talked about in conference looks different when dressed up in written words and sent out into the sunlight . . . . [W]e may be in the very middle of an opinion, struggling to reflect the reasoning all judges have agreed on, only to realize that it simply "won't write." The act of writing tells us what was wrong with the act of thinking.

F. Coffin, *THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH* 57 (1980); see also Henry Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1292 (1975)("The necessity for justification is a powerful preventive of wrong decisions."); cf. *United States v. Forness*, 125 F.2d 928, 942 (2d Cir. 1942)(Frank, J.)("[A]s every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that . . . the facts are thus-and-so gives way when it comes to expressing that impression on paper.").

Peter G. McCabe, Secretary  
Re: Proposed rule change

March 4, 2003  
Page 3

- Without written opinions, cases can be resolved in a manner inconsistent with other decisions, and blatantly at odds with established law and precedent, thus harming the litigants and undermining the public's confidence in the justice system. This has been widely recognized. As noted by the principal academic commentators in this area, "[a] key characteristic of decisions without opinions is their failure to provide the parties or the court below with any hint as to the court's reasoning. Accordingly, the practice under these rules has been uniformly condemned by commentators, lawyers, and judges." William Reynolds & William Richman, *The Non-Precedential Precedent — Limited Publication and No-Citation Rules in the United States Court of Appeals*, 78 COLUM. L. REV. 1167, 1174 (1978)(footnotes omitted).
- When an appeals court issues no rationale for its disposition, it makes it virtually impossible to appeal to the Supreme Court. The court may well actually be deciding a case based on a statutory or constitutional interpretation in conflict with the interpretation that is concurrently being given the same statute or constitutional provision by other circuits. But without any requirement to actually articulate the court's rationale, the circuit court split is unknown. The split may continue for years, and effect many litigants, before two circuits actually produce the conflicting written, and published, decisions that reveal the split and thereby make Supreme Court review possible.
- Federal law (28 U.S.C. § 1291) gives litigants a statutory right to appeal federal district court rulings to the federal court of appeals. Judgments without written opinions abrogate this right, and essentially makes the appeals courts into courts of certiorari. That is, if a circuit court can pick and choose which dispositions it believes suitable for providing a reasoned opinion supporting its disposition and can resolve the rest by simply reciting "we find no reversible error," there is at least the perception created that only the former dispositions have actually been given the court's full attention. This is appropriate for the Supreme Court exercising certiorari review; it is not appropriate for a circuit court to which every litigant has a statutory right to appeal. *See generally* William Richman & William Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 293 (1996)("Although Congress has given all losing litigants a statutory right to 'appeal,' decisional shortcuts have had the practical effect of transforming the courts of appeals into certiorari courts."); William Reynolds & William Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 626 (1981)("The conclusion is inescapable that, with regard to a large part of their caseload, the circuit courts have

Peter G. McCabe, Secretary  
Re: Proposed rule change

March 4, 2003  
Page 4

transformed themselves, contrary to congressional mandate, into certiorari courts.”).

- Because there is less potential for public scrutiny, the lack of written opinions increase the perception of, and the potential for, corruption in our courts.
- Based on their public statements, many well regarded judges would applaud the rule change that I propose. Justice Stevens is an example.

The judges [in former times] were guided by few written laws, but developed a meaningful set of rules by the process of case-by-case adjudication. Their explanations of why they decided cases as they did provided guideposts for future decisions and an assurance to litigants that like cases were being decided in a similar way. Many of us believe that those statements of reasons provided a better guarantee of justice than could possibly have been described in a code written in sufficient detail to be fit for Napoleon.

*Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 472 (1981)(Stevens, J., dissenting). Judge Patricia Wald of the D.C. Circuit has reached the same conclusion.

My own guiding principle is that virtually every appellate decision requires some statement of reasons. The discipline of writing even a few sentences or paragraphs explaining the basis for the judgment insures a level of thought and scrutiny by the court that a bare signal of affirmance, dismissal, or reversal does not.

Patricia Wald, *The Problem with the Courts: Black-Robed Bureaucracy or Collegiality Under Challenge*, 42 MD. L. REV. 766, 782 (1983). Judge Holloway of the Tenth Circuit has agreed.

[T]he basic purpose for stating reasons within an opinion or order must never be forgotten — that the decision must be able to withstand the scrutiny of analysis, against the record evidence, as to soundness under the Constitution and the statutory and decisional law we must follow, as to its consistency with our precedents. Our orders and judgments, like our published opinions, should never be shielded from searching examination.

*In re Rules of the United States Court of Appeals for the Tenth Circuit*, Adopted Nov. 18, 1986, 955 F.2d 36, 38 (10th Cir. 1992)(Holloway, C.J., dissenting). Judge Rubin of the Fifth Circuit has reached the same conclusion.

Every judge should be required to give his reasons for a decision, and those reasons should be sufficient to explain the result to the litigants but also to

Peter G. McCabe, Secretary  
Re: Proposed rule change

March 4, 2003  
Page 5

enable other litigants to comprehend its precedential value and limits to its authority.

Alvin Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME LAW. 648, 655 (1980).

• There is widespread recognition of the need for the rule change that I am proposing. Most recently, in the June 27, 2002, hearings on unpublished judicial opinions in the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property, Professor Arthur Hellman explicitly made the recommendation that a rule of the type I propose be put in place.

All cases should be decided by written decisions carefully written to explain who won and why, considering facts and the weight of all conflicting legal principles no matter how complex. Opinions should teach the parties and the public the appropriate law to be used in all factually similar cases, and explain why conflicting arguments and precedents are rejected. No working hypothesis of result should harden into a final result until it has survived thorough scrutiny by at least three well-trained and experienced minds considering legal argument and precedents that bring to bear the benefit of historical experience. All decisions must carry the warranty that they are decided by legal principles, right or wrong, that have been equally applicable to all similarly situated in the past, or will be for the foreseeable future. That warranty only becomes implicit when each decision becomes a part of the law itself.

Professor Hellman's view has been consistently the view of the organized bar.

Every decision should be supported, at minimum, by a citation of the authority or statement of grounds upon which it is based. When the lower court decision was based on a written opinion that adequately expresses the appellate court's view of the law, the reviewing court should incorporate that opinion or such portions of it as are deemed pertinent, or, if it has been published, affirm on the basis of that opinion.

ABA COMMISSION OF STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS 58 (1977).

We recommend that in every case there be some record, however brief, and whatever the form, of the reasoning which impelled the decision. . . . Opinions can be signed or unsigned, published or unpublished, but in each case the litigants and their attorneys would be apprised of the reasoning which underlies the conclusion of the court.

Peter G. McCabe, Secretary  
Re: Proposed rule change

March 4, 2003  
Page 6

COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND  
INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 50 (1975).

The most dramatic evidence of the importance which attorneys attach to a written record of the reason for a decision can be found in the view expressed by more than two-thirds of the attorneys surveyed that the due process clause of the Constitution should be held to require courts of appeals to write at least a brief statement of the reasons for their decisions.

*Id.* at 69.

You should note that the rule change that I propose does not enter the debate over classification of opinions as precedential vs. non-precedential, nor does it prohibit courts from such classification. Nor does it enter the debate over citation of opinions classified as non-precedential.

I would note that most of the discussion on both sides of the non-precedential opinion debate implicitly have been assuming that all opinions receive or should receive written opinions of one sort or another. Even those opposing citation of non-precedential opinions have recognized the value of written opinions in all cases when they have threatened — in Advisory Committee on Appellate Rules meetings and in front of the same House Subcommittee hearings referenced above — to write fewer opinions if citation of non-precedential opinions is allowed. Judge Alex Kozinski said at the June 27, 2002 House hearing:

In order to avoid having an avalanche of insignificant cases creating unintended conflicts and uncertainties, they would write “published” opinions that have very little useful content — akin to very abbreviated dispositions or judgment orders — that contain little more than the word “Affirmed”. . . . And we would have a tendency to say much less in our unpublished dispositions, in order to avoid having them interfere with our principal mechanism for setting circuit law, namely, the published opinion. And this would be too bad for the parties to those appeals. Under the current system, they at least get a reasoned disposition of some sort, a statement of their facts, however brief, and a genuine effort at explaining to them why they won or lost. If those words, now directed to the parties who know a lot about the case, must also be made usable by the multitudes who do not, we will simply say less . . . .

An argument might be made that the problems addressed by the rule change that I am proposing are not sufficiently significant in scope to justify the change. The official statistics on appellate cases decided without comment are provided to the Congress and public each year in Table S-3 of the Annual Report of the Director of the Administrative Office of the Courts,

Peter G. McCabe, Secretary  
Re: Proposed rule change

March 4, 2003  
Page 7

Leonidas Ralph Mecham. For the most recent three years data currently available, these reports state the following:

Year	Number of Cases w/o Written Comment	% of Total Cases
2001	1356	4.7%
2000	1136	4.1%
1999	1299	4.9%

In my view, these numbers would be too high even if they were accurate. But my research suggests that these statistics grossly understate the scope of the problem that my rule change is intended to address. I do not want to suggest the existence of any kind of malice or incompetence here, but it appears that, in at least some of the circuit courts, the clerical personnel who are responsible for supplying the circuit's statistics to the Administrative Office are reporting as "Cases without Written Comment," only those cases that explicitly refer to the circuit's local rule permitting affirmance without opinion. Other dispositions that do not expressly cite the local rule are reported to the Administrative Office as being dispositions supported by a written opinion even when that "written opinion" consists of nothing more than a pro forma recitation of the words, "having considered the arguments of the parties, we find that the district court committed no reversible error."

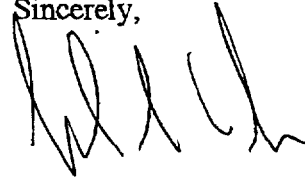
Finally, the rule change that I propose would impose little real burden on the circuit courts in most cases. The kind of "written opinion" necessary to comply with the rule need not be elaborate and, at least so far as I am concerned, it need not be designated for publication or citation. It could be accomplished by the law clerk assigned to write the bench memorandum on the case with a few minutes of work to modify the bench memorandum already in existence. But the point of my proposed rule change is that, sometimes, even written opinions of this kind just "won't write" because the disposition that the court has reached cannot be justified by the law and facts. When this occurs, the court has good reason to question its disposition and an unjust result can thereby be avoided. It would not take many such instances for the result of this rule change to justify the relatively minimal effort that will result from its adoption.

Peter G. McCabe, Secretary  
Re: Proposed rule change

March 4, 2003  
Page 8

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Weeks', written in a cursive style.

Joseph R. Weeks  
Professor of Law

cc: Honorable Samuel A. Alito, Jr.  
Professor Patrick J. Schiltz  
Honorable Anthony J. Scirica  
Professor Daniel R. Coquillette